Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

James A. Grace

Petitioner

v.

Secretary of Defense

On Petition For Writ of Certiorari
To the United States Court of Appeals
For The Second Circuit

PETITION OF WRIT OF CERTIORARI

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51PP

QUESTIONS PRESENTED

1. In a suit against a federal agency alleging discrimination for engagement in protected activity in violation of Section 717(c) of the Civil Rights Act, as amended, 42 U.S.C. section 2000e et seq. (Title VII), has the plaintiff satisfied the minimal requirements for establishing a prima facie case of discrimination by showing 1) he was qualified for his position, 2) he engaged in a "protected activity," 3) his employer knew of his engagement in the protected activity and, 4) he was fired two months after the engagement in the protected activity?

2. In a Title VII wrongful termination suit as referenced above, where the plaintiff was a federal employee subject to a federal statute which mandates his performance be appraised in accordance with an established performance appraisal system – has the defendant met its burden of producing legitimate, nondiscriminatory reasons to rebut the plaintiff's prima facie case of discrimination where all such proffered reasons lie outside of the plaintiff's performance appraisal system?

LIST OF PARTIES

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   (Rule 29, 4(a) – Rules of the Supreme Court)

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JURISDICTION

The date on which the United States Court of Appeals decided the case was October 29, 2001. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000e-3

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, ...

29 CFR 1613.261

. . .It is unlawful to restrain, interfere, coerce or discriminate against complainants, representatives, witnesses, . . . because of any opposition to an unlawful employment practice under the part.

29 CFR 1604.11

(a) Harassment on the basis of sex is a violation of section 703 of title VII.

5 U.S.C 43021

For the purpose of this subchapter-

(1) "agency" means-

(A) an Executive agency; . .

(2) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

5 U.S.C 4302

(a) Each agency shall develop one or more performance appraisal systems which-

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for-

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system;

(2) . . . with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communication to each employee the performance standards and the critical elements of the employee's position;
(3) evaluation each employee during the appraisal period on such standards;
(4) recognizing and rewarding employees whose performance so warrants;
(5) assisting employees in improving unacceptable performance; and
(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

STATEMENT OF CASE

On May 3, 1988, petitioner, James A. Grace (hereinafter "Grace," "plaintiff," or "petitioner") was hired at the Navy Resale and Services Support Office ("NAVRESSO") as an "EDP Audit Supervisor." NAVRESSO is a Nonappropriated Fund Instrumentality (NAFI) of the federal government. It has oversight and management responsibility for the Navy Resale System – basically Navy exchanges (retail stores), ship stores, and sundry other retail operations for Naval servicemen and their families throughout the world.

As a NAFI, NAVRESSO funding is derived primarily from revenues generated from its commercial retail operations, as opposed to appropiations from Congress. At the time of Grace's tenure, NAVRESSO's worldwide annual revenues were roughly $2.5 billion. NAVRESSO is managed jointly by Navy military (uniform) and civilian personnel. It is headed by a Navy admiral. NAVRESSO civilian employees are deemed Department of Defense employees pursuant to federal statute. Hence, the naming of the Secretary of Defense in the instant action.

Despite fraudulent attempts to portray Grace as an auditor generalist at NAVRESSO, he was clearly hired as an EDP auditor specialist. EDP (Electronic Data Processing) auditing is a relatively new and specialty field within the larger audit profession where audit focus is placed on information systems/computer processing/computer technology.

In early 1988, NAVRESSO advertised in the National Employment Weekly for an EDP Audit Supervisor position. It was that position to which Grace observed and specifically applied. The cover letter he sent NAVRESSO, along with a resume, specifically identified the EDP audit supervisor position as the position to

which he was applying. Every position listed on his resume was EDP audit in nature. The position to which he was eventually offered, and to which he accepted, was defined as "EDP Audit Supervisor." When Grace commenced employment with NAVRESSO in May 1988, virtually his entire professional audit background, roughly 6-7 years, was in EDP auditing with practically nothing in traditional/financial auditing.

Grace commenced employment at NAVRESSO at a UA-13 level (GS-13 equivalent). As that level indicates, a professional position. Grace was also a member of NAVRESSO's Senior Management Program (SMP). Grace's background includes an undergraduate degree (major in Accounting) from the Wharton School of the University of Pennsylvania, graduate work at Temple University, and a Certificate in Computer Programming from Maxwell Institute (a computer trade or tech school). He is a former Certified Public Accountant (CPA), Certified Information Systems Auditor (CISA), and holds a Certificate in Data Processing (CDP).

During Grace's first week on the job at NAVRESSO, he constructed the initial phase of his Management by Objectives (MBO) – the setting of performance objectives, along with standards in which to measure such performance, for the coming year. Grace's supervisor, Richard Beauchemin, approved and signed off on Grace's MBO/performance objectives and measurement standards. Grace's MBO represents the established performance appraisal system in which Grace's performance was to be judged pursuant to various policies promulgated by NAVRESSO, Department of the Navy, Department of Defense, and federal statute (i.e., 5 U.S.C. 4302). Grace would ultimately be fired, allegedly on the grounds of poor performance, without anything ever being tied to his

MBO/performance appraisal system. This issue is taken up at length in the argument section of this writ.

Grace's principal performance in his MBO was to "ensure adequate EDP audit coverage of NAVRESSO's EDP systems/applications, computer hardware, and EDP functional areas, given established EDP resources." Nothing in Grace's MBO/performance appraisal system has him involved in traditional/financial auditing. Nothing in Grace's MBO/performance system has Grace involved in training anyone, with the exception of computer training for non-EDP audit staff (something to which Grace has never been criticized).

In August 1988, in response to a formal request for nominations from NAVRESSO's Equal Employment Opportunity (EEO) Department, Grace submitted the name of a co-worker, Bill Olarin, for the annual Human Relations Award based on his stand against flagrant sexual harassment in the Navy. Pursuant to NAVRESSO policy governing this Award (i.e., NAVRESSO Internal Instruction 5305.1D), the Award was to go to someone who had shown "care and concern for improving life of others." Grace felt that Olarin, in taking a stand against flagrant sexual harassment, had shown this "care and concern for improving life for others."

Grace submitted his nomination of Olarin on August 31, 1988 directly to NAVRESSO's EEO office. The previous day, August 30, 1988, Grace's supervisor, Richard Beauchemin, had completed his evaluation of Grace's audit of NAVRESSO's payroll applications, the most significant project Grace had worked on during his tenure at NAVRESSO. On that August 30 evaluation, Beauchemin praised Grace's work as "Outstanding" and included other glowing remarks

such as "approved excellent," "well written," and "again good job."

On September 6, 1988, Beauchemin had found out that Grace had nominated Olarin for the Human Relations Award and confronted him twice that day regarding the nomination. During the first confrontation, occurring around noon, Beauchemin, with a somewhat horrified expression or demeanor, stated to Grace that he had "heard" about the nomination and a asked Grace why he did it. He told Grace that he should have gone through him on the nomination. He also stated that there has been something going on and told Grace to "keep it quiet."

Grace has expressed a belief during his deposition that Beauchemin's statement to him that he should have gone through him was out of regret that he didn't have the opportunity to squash it before it made it out of the audit department. Grace depo. p. 81, line 6. Contrary to statements made in the District Court's Memorandum and Order dismissing Grace's claim that Grace violated organization protocol by not submitting the nominating memo through Beauchemin, Grace violated no organizational protocol in submitting the nomination. The NAVRESSO policy with governs the nomination process for the annual Human Relations Award states very clearly that such nominations go "directly to the Equal Employment Opportunity Office" (not to one's supervisor).[1]

Later the same day on September 6, 1988, Beauchemin again confronted Grace on the nomination of Olarin and asked Grace who he had nominated (by then Beauchemin had known full well who Grace had nominated). Grace subsequently informed Beauchemin who he had nominated and explained why, to which

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[1] NAVRESSO Internal Instruction 5305.1D.

Beauchemin responded by shaking his head disgustingly. Seeing this disapproval, Grace then asked Beauchemin is he should not have done it, to which Beauchemin responded "no comment." Grace's nomination of Olarin was clearly an affront to Beauchemin, and Beauchemin let Grace know it!

At no time during these confrontations Beauchemin had with Grace did the subject of the nominating memo's construction ever come up. Nothing in Beauchemin's speech in either one of these two confrontations would indicate that Beauchemin had ever read Grace's nominating memo. In fact, when Beauchemin approached Grace, he told him that he had "heard" (not read) about the nomination. The point here is significant here since the District Court had concluded that it was the construction of the nominating memo that bothered Beauchemin; a conclusion contrary to the facts. At deposition, Beauchemin denied ever talking to Grace about his nomination of Olarin stating that Grace never discussed it with him, he never discussed it with Grace, and that he never learned of the nomination until after Grace was fired. Beauchemin depo. p. 144, lines 5-14; p. 145, line 15). These statements of Beauchemin at deposition utterly contradict his previous statement he made during a Navy administrative investigation of Grace's EEO complaint where he acknowledged, under oath, that he had confronted Grace regarding the nomination.

At the time Beauchemin confronted Grace on his nomination of Olarin, Olarin had in the previous week filed a formal EEO complaint against Beauchemin. About half a year earlier, Olarin had filed a formal complaint against Beauchemin under the Whistleblower Act with the Department of Defense. A year prior, Olarin had informed the Naval Audit Service of Beauchemin's incompetence during a peer review they

performed of NAVRESSO's internal audit function – a disclosure which ultimately was contained in their formal audit report to NAVRESSO's senior management and others.

Following these confrontations of September 6, Grace discerned very dramatic and rapid changes in the way he was treated by his management, particularly Beauchemin.

Prior to these confrontations, Grace enjoyed a very good relationship with Beauchemin and Devine. The fact that Beauchemin one time prior to September 6, 1988 ordered Grace to falsify his travel expense form[2], as Grace has testified to at trial[3], attests to a good relationship. After the September 6 confrontations, with the atmosphere of suspicion and distrust that permeated the relationship, it is believed that Beauchemin would not have given that same order to Grace.

Two weeks after the September 6 confrontations, Grace was called into a meeting with Beauchemin and Devine and told, in effect, that he was doing a poor job. Just a few weeks earlier, he was informed, in writing, that he was doing "Outstanding" work. Also about this time, yet unbeknownst to Grace while employed at NAVRESSO, Beauchemin would begin the construction and maintaining of secret, "closet files" on Grace wherein Grace was highly criticized and slandered.

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[2] The reason Beauchemin instructed Grace to falsify his travel expense form is because the two had gone on a trip together, Grace had made a required disclosure on his expense form that Beuchemin had not. Therefore, the disclosure on Grace's form would highlight the lack of such disclosure on Beauchemin's. Grace refused the order. Had he complied, he would have received money to which he was not entitled and committed fraud.

[3] Trail Transcript, p. 67, lines 1-20.

After the September 6 confrontations, timeless workplace deficiencies of one of Grace's subordinate's (Ruth Pang) were attributed to Grace under some nebulous guise of supervision and/or communication. This represents a 180 degree turnaround on the part of Beauchemin who had previously referred to Pang a "problem employee" and spoke of how he would "shitcan her right out of here." Trial Transcript p. 45, line 1; also Grace depo. p. 110, line 13. He was ordered to communicate to her twice a day and was even written up in one of Beauchemin's secret files on Grace for failing to achieve it one week when Grace was out of the office for large segments of the day attending training, orientation.

After the September 6 confrontations, Beauchemin placed a ludicrous demand on Grace to keep one of his subordinate's (David Cato, an intern just out of college who had never performed an audit in his life) busy or continuously occupied with audit work 100% of the workday and that if Grace did not make this commitment, then he would have to take Cato off of his team and he could no longer be a supervisor (implied demotion). Such a demand was never placed on any of the other departmental supervisors at Grace's level. The demand was placed on Grace at a time when Grace was a new employee, involved with a myriad of tasks, projects, and assignments, and did not have a qualified or journeyman level EDP auditor to work with Cato. At deposition, Beauchemin stated that he placed this demand on Grace due to his "goofing off" (Beauchemin depo. p. 148, line 9). Yet Grace's task list displays, not someone "goofing off," but busy with a wide assortment of tasks/jobs/duties/assignments. Devine praised the work Grace had done on two ad hoc assignment he had given Grace, and Beauchemin had previously assessed Grace's work as outstanding. Grace never missed a day of work at NAVRESSO and put in extensive overtime

(without extra pay). When asked by Grace's counsel during deposition to cite a specific instance of Grace "goofing off," Beauchemin could not name a single one. Beauchemin depo. p. 148, lines 21-23.

After the September 6 confrontations, Grace was denied a training request that was afforded other supervisors in the department.

Grace had requested of Beauchemin an assistant EDP auditor, that is, someone qualified of a journeyman level in the field of EDP auditing to assist Grace. Beauchemin denied this request citing "funding constraints." Subsequently, Grace watched as new experienced financial auditors were hired and placed on audit teams already larger than Grace's.

Grace could see a radical change in the way he was treated by Beauchemin following the September 6 confrontations, and even communicated it to coworkers, people who knew Beauchemin and recognized that Beauchemin would retaliate against him for the nomination of Olarin. This was reflected in joking remarks they made to Grace that he should ask for the nomination back, that he should have nominated [a Beauchemin crony] for the award. Grace depo. p. 103, lines 1-25. Grace also communicated a similar message to a NAVRESSO EEO counselor prior to his discharge. Id.

Two months after Beauchemin's confrontations with Grace over the Olarin nomination, Grace was fired.

The official reason offered for Grace's firing have varied over time. They include:

1. "[P]oor performance of his supervisory and technical duties." This was concluded in NAVRESSO's in-house EEO administrative review of Grace's

complaint.[4]

2. Refusal (i.e., insubordination) "to accept the responsibility for the supervision of all audits."[5]
3. "[I]nadequacies in his overall performance.[6]
4. "[I]nability to provide his subordinates with appropriate training and supervision"[7]

Grace believes that the above proffered reasons for his firing are pretexual. It is impossible for all the different reasons articulated above to be true. The fact that very different reasons have been proffered for Grace's discharge over time evidences dishonesty. Still the district court has concluded that Grace has not demonstrated pretext.

The above different proffered reasons reflect the propensity of the other side in this case to go with whatever "story" sounds good at a particular point in time, only to discard it later when deemed inadequate, and then adopt a new story for Grace's discharge. None of the proffered reasons noted above, including that of the district court have ever been tied to Grace's performance appraisal system.

Grace believes he was fired as a consequence of nominating fellow employee Bill Olarin for NAVRESSO's Human Relations Award on the basis of his stand against flagrant sexual harassment in the Navy. Grace believes that his firing was both wrongful and unlawful. It has resulted in the destruction of his professional

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[4] EEO Counselor's Worksheet and Report, prepared by Lynn Reinhardt, Feb. 17, 1989

[5] Documented in letters to various government officials by NAVRESSO's Executive Director.

[6] Answer to the Amended Complaint, March 10, 1993, paragraph 20.

[7] Memorandum and Order of U.S.D.J. Denis Hurley, August 28, 2000.

career and has impacted negatively on many other areas of his life.

In January 1989, Grace filed a formal EEO complaint with the Deputy Assistant Secretary of the Navy claiming reprisal. In January 1990, after double the 180 day statutory period had elapsed without a final agency decision from the Navy, Grace moved his complaint into federal district court as provided under federal statute.[8]

Unbeknownst to Grace at the time he filed his civil action, the filing of that civil action had the effect of halting the Navy's administrative review process of Grace's EEO complaint pursuant to statutory provision. While the final agency decision was never issued on Grace's EEO complaint, a "Report of Investigation" was in fact completed regarding the Navy's administrative review of Grace's EEO complaint. That Report contained a conclusion that Grace had established a prima facie case of discrimination.[9] This conflicts with the district court's conclusion that Grace had not established a prima facie case of discrimination – a prominent issue discussed later in this writ of certiorari.

In August 1993, U.S. District Court Judge Denis Hurley dismissed the civil action "[b]ecause plaintiff has not named the proper party defendant." In dismissing the action, Judge Hurley did so citing a motion of the defendants which did not exist and himself not getting the proper party defendant correct by referring to the

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[8] 29 CFR 1614.310 (with secondary reference to 5 U.S.C. 7702).

[9] Report of Investigation, prepared by Willian E. Blakely, Naval Civilian Personnel Center, Discrimination Complaints Investigation Component, U.S Naval Base-Philadelphia, Building 75-3, Philadelphia, Pennsylvania, 19112-5006, Pages 7, 8.

Department of Defense (not the Secretary of Defense) as the proper party defendant (in Title VII cases, one sues the head of the agency, not the agency itself). Thus, Judge Hurley dismissed the case on a technical error that he had not gotten correct himself, and did so in the face of a litany of case law/precedents that cases should be tried on their merits as opposed to legal technicalities. Grace appealed to the U.S. Court of Appeals for the Second Circuit, and in March 1994, the case was remanded back to the district court.

A one day bench trial was held on November 5, 1999 before U.S. District Court Judge Denis Hurley who about 10 months later dismissed the action entering a judgment for the defendant and against Grace. In his decision, Judge Hurley concluded that Grace had not made out a prima facie of discrimination, although arguing that even if he had, he still had not proven that the reasons advanced for his discharge were pretexual. Grace appealed the decision to the U.S. Court of Appeals for the Second Circuit.

On October 29, 2001, the U.S. Court of Appeals for the Second Circuit issued a summary order affirming the judgment of the district court. A reformatted copy of that summary order is contained in the appendix to this writ – pages 38 - 41.

REASONS FOR GRANTING PETITION

Part I – The Issue Of The Prima Facie Case

In the judgment against Grace, the district court concluded that Grace failed to establish a prima facie case of discrimination while acknowledging that Grace had met three out of four components needed to establish such a case. The three components that the district court concluded Grace had met were: 1) he

engaged in a protected activity, 2) his supervisor was aware of it and, 3) he suffered an adverse employment action in being fired. Memorandum and Order of U.S.D.J. Denis Hurley, August 28, 2000. See appendix at page 35.

The district court however, concluded that Grace had failed to establish a fourth component needed for a prima facie case – a causal connection between the protected activity and the adverse employment action. Id. The district court recognized a "temporal proximity" between Grace's engagement in the protected activity and his discharge, but stated "that evidence is more than offset by the evidence which establishes that his discharge was caused by his inability to provide his subordinates with appropriate training and supervision." Id., appendix at pages 35, 36.

The basic approach noted above, that is, that the four above-referenced conditions must be met in order to establish a prima facie case of discrimination established in *Reed v. A.W. Lawrence & Co. Inc.*, 95 F. 3d 1171 (2d Cir. 1996). There is no quarrel with this approach. However, the conclusion of the district court that Grace failed to establish a "causal connection between the protected activity and the adverse action" – is strenuously opposed. This conclusion is inconsistent with principles established in *Reed v. A.W. Lawrence & Co.* More significantly, the way in which the District Court arrived at this conclusion is without legal precedent, clearly erroneous, and conflicts with various Title VII case law.

In *Reed v. A.W. Lawrence & Co.*, the Second Circuit concluded that a "causal connection . . . 'can be established indirectly by showing that the protected activity was closely followed in time by the adverse action. *Reed*, 95 F. 3d 1178 (2d Cir 1996) quoting *Manoharan v. Columbia Univ. College of Physicians &*

Surgeons, 842 F. 2d 590, 593 (2d Cir. 1988). This is precisely what Grace has done in the instant action – shown that the protected activity was closely followed in time by the adverse action; and the district court has even acknowledged it referring to it as a "temporal proximity." See appendix at page 35.

In *Reed v. A.W. Lawrence & Co.*, the plaintiff had established a "causal connection between the protected activity and the adverse employment action" by showing that there was a short time period between the two events; and the district court in that case ruled that she had established a prima facie case of discrimination (which went unchallenged by the defendant – at least the issue of the "causal connection"). Grace has done exactly the same thing, i.e., shown a short time period between his engagement in protected activity and his firing. Yet the district court ruled in his case that he had failed to establish this causal connection between the protected activity and the adverse action, and thus failed to establish a prima facie case of discrimination.

Now to the issue of the way in which the district court arrived at the conclusion that Grace has failed to establish a prima facie case. The district court concluded that Grace was "not aided by the temporal proximity between [the protected activity] . . . and his discharge on November 8, 1988 because that evidence is more than offset by the evidence which established that his discharge was caused by his inability to provide his subordinates with appropriate training and supervision." See appendix at p. 35, 36.
In *Reed*, not only was the plaintiff "aided" by the temporal proximity between the protected activity and her discharge, but it was sufficient in and of itself to establish this causal connection, and without challenge from the defendant.

What is even more noteworthy is that the district court took proffered reasons for Grace's discharge, which incidentally have been strongly contested by Grace, and used those reasons to "offset" this "temporal proximity" (a bona fide factor in establishing a "causal connection"/prima facie case). This approach is without parallel, clearly erroneous, and flies in the face of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and; *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973) (landmark Title VII cases).

The above reference case law presents a phased approach regarding judicial assessment of Title VII discrimination cases – to use the words taken form one opinion: "the goal to 'progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n 8 (1981). The first phase involves the plaintiff who must establish a prima facie case of discrimination. *St. Mary's* 509 U.S. 502, 506. The burden placed on the plaintiff to establish a prima facie case of discrimination is not onerous. *Henderson v. Center for Community Alternatives*, 911 F. Supp. 689, 700 (S.D.N.Y. 1996). (The latin term "prima facie" means "first appearance.") "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) quoting *Burdine*, supra, at 254.

Once a plaintiff establishes a prima facie case, the burden then shifts to the defendant to produce "an explanation to rebut the prima facie case – i.e, the burden of 'producing evidence,' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason. . . . If the defendant carries

this burden of production, the presumption raised by the prima facie case is rebutted." Id., at 506, 507 (emphasis added).

If the defendant offers "legitimate, nondiscriminatory reasons" in response to a prima facie case of discrimination, then the presumption raised by the prima facie case is rebutted, and the burden then shifts back to the plaintiff that "the proffered reason was not the true reason for the employment decision . . . and that [discrimination] was." Id. At 508. In the instant action, the district court took reasons proffered for Grace's discharge not to rebut the "presumption" raised by a prima facie case of discrimination, but rather to undo or "offset" the prima facie case altogether, basically rending a judgment that Grace had never established a prima facie case. This approach of the district court was clearly erroneous and conflicts with the various Title VII case law referenced above.

Reasons proffered by a defendant for a plaintiff's discharge (if legitimate, nondiscriminatory) may rebut the presumption raised by a prima facie case, which then shifts the burden back to the plaintiff to demonstrate pretext, but such proffered reasons do not undo, negate, or "offset" the prima facie case to the degree that it is deemed that the plaintiff never established one. The district court has basically used such proffered reasons as a way of "offsetting" Grace's prima facie case of discrimination.

Part II – The Issue of the Performance Appraisal System

Federal law mandates that federal employees' performance be evaluated within the context of a performance appraisal system. The applicable statute is 5 U.S.C. 4302; the language is clear and emphatic. It specifically requires each federal agency to "develop one or more performance appraisal systems which – (1)

provide for periodic appraisals of job performance of employees." It also specifies that the "results of performance appraisals" be used as the "basis for . . . removing employees." "Unacceptable performance" is defined as "performance of an employee which fails to meet established standards in one or more critical elements of such employees position."

Various Department of Defense and Department of the Navy policies mirror the federal statute noted above. Notably among them is Secretary of the Navy (SECNAV) Instruction 5300.22B – Navy and Marine Corps Personnel Policy Manual for Nonappropriated Fund Instrumentalities (NAFI). The policy mandates that "[h]eads of NAFI Headquarters Elements [NAVRESSO being a NAFI Element] will establish performance appraisal systems. . . . Performance appraisal systems will, at a minimum, distinguish between satisfactory and unsatisfactory performance." (p. V-2)

Consistent with the federal statute noted above and the Department of Defense and Navy policies, NAVRESSO has established its own policies governing the performance appraisal process. During his tenure at NAVRESSO, Grace was a member of NAVRESSO's Senior Management Program (SMP). NAVRESSO Instruction 12310.5A, which addresses the subject of NAVRESSO's Senior Management Program, mandates the "measurement of performance based on the principle of Management by Objectives."

Management by Objectives (MBO) is a well known performance appraisal system used both in the federal government and the private sector. Inherent within this performance appraisal system is the setting of performance objectives or goals, which are mutually established between an employee and his supervisor. Subsequently, measurement standards are defined in

which to measure the employee's performance against the established performance objectives.

Since an individual employee's performance objectives are typically in sync with overall organizational objectives, the MBO approach helps ensure that organizational goals are achieved. The program lets employees know what is expected of them, and thus influences employee motivation. It is a mechanism for letting employees know, in a professional manner, whether they are accomplishing their job, meeting expectations, and where improvements are needed. It is a way of rewarding employees in a fair and equitable manner. It leads to greater efficiency, effectiveness, and improved employee morale within an organization – whether governmental or private/commercial.

The MBO approach also contains internal controls, i.e., internal safeguards to ensure that employees are fairly evaluated against established objectives and standards[10]. This lends a degree of discipline and control to the process. It forces supervisors to evaluate performance in the context of pre-established, agreed upon, attainable goals – supposedly in sync with overall organizational goals and uniform with other employees at the same level. It guards against capricious, arbitrary, discriminatory, and retaliatory personnel action. In the instant action, such safeguards/internal controls have been completely circumvented.

In the instant action, the scenario was not one in which the district court examined Grace's MBO/performance appraisal system and augmented it with factors outside that system to arrive at its

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[10] E.g., note the use of the word "objective" in 5 U.S.C. 4302(b)(1): "accurate evaluation of job performance on the basis of objective criteria."

conclusion. Rather, the scenario was one in which everything the district court relied upon as evidence against Grace fell outside Grace's performance appraisal system with nothing coming from within that system.

To help punctuate the point being made here, an example from the case appears to be in order. In U.S. District Court Judge Denis Hurley's Memorandum and Order dismissing Grace's claim, he cites Beauchemin testimony that Grace "almost had a physical confrontation with one employee" (see appendix at page 29). This is evidence that Judge Hurley has accepted and a prominent part of the overall evidence that Judge Hurley has deemed legitimate and nondiscriminatory in adjudicating the case against Grace.

The person Grace has been *falsely* alleged to have "almost" a physical confrontation is Phillip Howell, an intern during Grace's tenure at NAVRESSO (never an employee under Grace's supervision). Grace concedes to a one time oral dispute with this individual. The occasion of the dispute came when Grace was discussing the subject of his subordinate's travel expense form with that subordinate (David Cato) when Mr. Howell suddenly took it upon himself to gratuitously enter into this conversation Grace was having with Cato basically arguing for the violation of NAVRESSO policy. His presence in this conversation was uninvited, and his views were not sought by Grace nor Cato.

Grace retrieved the documented policy governing the expense form and challenged Mr. Howell to substantiate his position from the policy which, of course, he could not do. Grace never had an oral dispute with this individual before nor since. And during this one time oral dispute with Mr. Howell, Grace did not threaten him, nor curse at him, nor use

any profanity/vulgarity, nor any derogatory speech, nor make any personnel attacks agasint Mr. Howell but rather kept his statements focused on the subject of the expense form. The was no physical confrontation. There was no "almost" a physical confrontation.

At Grace's deposition, opposing counsel, namely Assistant U.S. Attorney Vincent Lipari, asked Grace if anyone ever told him that they thought he and Mr. Howell were about to start fighting and Mr. Grace responded "no." Apparently surprised by the answer, Mr. Lipari repeated the question and again Grace responded "no." Grace depo. p. 127, line 7.

Beauchemin was not present in the room when Grace had this oral dispute with Mr. Howell and has never claimed that he witnessed it. He has never cited a source nor a basis for his statement that Grace almost got into a physical confrontation with Mr. Howell, nor has anyone else from NAVRESSO, the Navy, or the attorneys representing the defendant.

At deposition, Beauchemin was asked if he had "any recollection of this [almost] altercation" and he responded "No." Beauchemin depo. p. 54, lines 8-10). The next question posed to Beauchemin was whether he "observed this incident" – to which he responded "I don't remember." Id, lines 18-19.

Grace was never written up nor disciplined in any way in connection with this oral dispute with Mr. Howell during his tenure at NAVRESSO, and indeed, he was defending NAVRESSO policy, which if anything, would warrant a compliment.

At Grace's trial on November 5, 1999, opposing counsel never once raised the subject of the [falsely] alleged almost a physical confrontation – and wisely so, for opposing counsel knew that there was nothing

there. If there were even the slightest hint of impropriety on the part of Grace here, surely opposing counsel would have made it a prominent issue at trial.

The rest of the evidence used against Grace is of a similar quality. Space limitations in this writ preclude discussions on it. Suffice to say that the so-called "evidence" against Grace represent the contrived fabrications of a reprobate, namely, Richard Beauchemin; a man who had engaged in demonstrable perjury on a material matter in the instant action (regarding whether he confronted Grace on his nomination of Olarin); engaged in scores of other inconsistent/incongruous statements; instructed Grace to commit fraud to which Grace has testified at trial (so as to cover his own fraud)[11]; known to lie as Grace testified at deposition (citing a statement from a subordinate who claimed that Beauchemin lied about him)[12]; judged incompetent by the Naval Audit Service during a peer review of NAVRESSO's audit function; and known to "edit" audit reports to the point where the entire meaning of the report is changed (disclosed in the final report of that peer review).

The district court has accepted such evidence as noted above regarding the falsely alleged "almost" a physical confrontation as "legitimate" in dismissing Grace's claim while ignoring the most significant and fundamental of all evidence – Grace performance appraisal system. There is absolutely no reference whatsoever to Grace's MBO/performance appraisal system in the Memorandum and Order of the district court dismissing Grace's claim. See appendix pages 27 – 37.

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[11] Trial Transcript, p. 67, line 1.
[12] Grace depo. p. 90, line 25.

The district court has completely ignored the issue of Grace's performance appraisal system at irrelevant while accepting of the crudest testimony used to discredit Grace. Yet in a wrongful termination suit, as in the instant action, where the plaintiff is alleged to have been fired on the grounds of poor performance, there is nothing more relevant imaginable than the employee's performance appraisal system.

The beauty of the MBO program is that is precludes the madness noted above, that is, where a politically connected reprobate can say anything and have it stick. It forces reviewers to go to the only mechanism allowed by law and policy in which to *properly* appraise an employees performance – an established performance appraisal system.

Grace was a highly trained professional (Wharton School, CPA, etc.) who deserved to have his performance appraised in a professional manner consistent with federal law and agency policies. Rather, he was summarily fired, outside the parameters of such law and policies, on the word of a reprobate.

If Grace's performance were inadequate or as the district court has referred "woefully inadequate," it would be a fair question, and one very reasonable, to present to such court Grace's established performance appraisal system and ask where Grace has fallen short within the context of that system. If the court can produce absolutely nothing from within that performance appraisal system, as is the case in the instant action, then the conclusion that the defendant has come forward with "legitimate" reasons for plaintiff's discharge is really quite absurd!

The argument being presented here to the Supreme Court is that by going outside Grace's performance appraisal system, the defendant violated a federal

statute, plus numerous agency policies, and therefore has not met its burden in producing "legitimate, nondiscriminatory" evidence to rebut the presumption raised by Grace's prima facie case of discrimination. Evidence proffered for Grace's discharge is clearly in violation of federal law and certainly not "legitimate."

It is recognized that the burden placed on a defendant to rebut a presumption of discrimination raised by a prima facie case is one of production, not persuasion. Notwithstanding, the argument being presented here is that the federal statute (5 U.S.C. 4302) narrows the scope of that production to that which is within the context of an established performance appraisal system. This is not a matter of conjecture on the part of Grace. It is a matter of law as defined in the United States Code. To argue otherwise would be to lay aside a federal statute, to make it of no effect.

To argue otherwise would also shift the burden to the plaintiff, Grace in this case, to demonstrate that the proffered reasons for his discharge are pretext. But if the proffered reasons for Grace's discharge are a violation of a federal statute, which they are, then why should Grace have a burden of demonstrating pretext of that which is unlawful? In such a scenario, whether Grace succeeds or fails in is efforts to demonstrate pretext, the proffered reasons are still a violation of the federal statute. What has Grace accomplished?

In the interests of justice, the onus should not be placed on Grace to demonstrate pretext for that which is clearly a violation of United States Code, rather the onus should be placed on the defendant to operate within those lawful parameters, to comply with its own policies, and to produce evidence within that context. If the defendant can do that, then the burden should

rightfully shift back to the plaintiff to demonstrate pretext.

In the Second Circuit's Summary Order affirming the judgment of the District Court, it states that the "lack of a proper performance evaluation was one factor that the district court was entitled to consider in determining whether defendants had acted out of improper motivation, but it did not require the court to reach a conclusion that such improper motivation had occurred." See appendix at page 42. The principal case cited in the Second Circuit's Summary Order was *St. Mary's Honor Center v. Hicks* and the only one which was quoted. Appendix at 41, 42.

Wile the district court treated the issue of Grace's performance appraisal system as irrelevant, the Second Circuit threats it as peripheral – relegated to merely "one factor" in an implied unspecified number of other factors. Notwithstanding, there is nothing in the record, that is, the district court's Memorandum and Order dismissing the case that would suggest that the district court ever considered it a factor at all! Appendix pages 27 – 37. And while it can be argued that the lack of proper performance appraisals within the context of an established performance appraisal system may not "require" a court to reach a conclusion of intentional discrimination in and of itself – the issue has everything to do with the matter of whether reasons proffered for a plaintiff's discharge are "legitimate" and constitute that which is admissible before a court of review.

The Second Circuit relegates a proper performance evaluation to "one factor," but does not specify what those other factors are nor why they should take precedence over an established performance appraisal system. From the standpoint of Grace's performance, an issue which is vital in the instant action, there are

no other factors. 5 U.S.C. 4302 simply does not provide for other "factors" outside of an established performance appraisal system. As referenced earlier in this writ, the language of 5 U.S.C. 4302 is quite clear and emphatic (emphasis added):

> (a) Each agency shall develop one or more performance appraisal systems which-. . . .
>
> (3) use the results of performance appraisals as the basis for . . . removing employees.
>
> (b) . . . , each performance appraisal system shall provide for-. . .
>
> (6) . . . removing employees who continue to have unacceptable performance[13] but only after an opportunity to demonstrate acceptable performance.

Regarding *St. Mary's Honor Center v. Hicks*, 509 U.S. at 515 – this case is highly distinguishable, in many ways, form the instant action. Unlike Grace, Hicks was not a federal employee working within a federal agency subject to 5 U.S.C. 4302 and various agency policies which mandate proper performance appraisals within the context of an established performance appraisal system.

In *St. Mary's Honor Center v. Hicks*, the plaintiff was able to demonstrate that the proffered reasons for his discharge were pretext, yet still the district court entered a judgment against him concluding that Hicks

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[13] "Unacceptable performance" is defined under 5 U.S.C. 4301 (3) as "performance of an employee which fails to meet established performance standards." (emphasis added).

"has not proven that the crusade was racially rather then personally motivated." Id. at 508. In the context of the federal government, it is, of course, unlawful to fire an employee for his race, but it is also unlawful to fire an employee for "personally motivated" reasons. Such personnel actions are barred pursuant to 5 U.S.C. 4302. Had Hicks been a federal employee, demonstrating that the employer's proffered reasons for his discharge were pretext but unable to prove it was race motivated, then the default, at a minimum, would be personal animus. Is one to understand that a federal agency caught lying and found firing a federal employee for personal animus is excused or justified in doing so because the plaintiff could not prove it was race?

None of the cases cited by the Second Circuit deal with a federal employee subject to 5 U.S.C. 4302; nor has the district court in this action cited any such cases. The instant action represents new ground that the Supreme Court has not ruled upon, but should, due to its importance. The case here encompasses a much broader scope of inquiry dealing with the policy and practice of how employees' performance are appraised within the context of the federal workforce. The impact goes not just to terminations, but demotions, transfers, promotions, merit pay, employee morale, justice and fairness in employee evaluations, organizational efficiency and effectiveness, and the achievement of organizational goals and objectives.

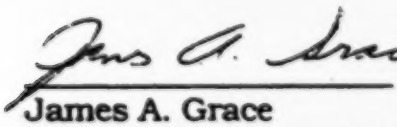
In summary, Grace has presented two arguments in this writ: 1) he had established a prima facie case of discrimination and, 2) the defendant, by operating outside the parameters of federal law, has not come forward with "legitimate, nondiscriminatory" reasons for Grace's discharge to rebut the presumption of discrimination raised by Grace's prima facie case.

This entitles Grace to a verdict in his favor under the *Burdine* model: "[I]f the finder of fact . . . finds that a prima facie case *is* supported by a preponderance of the evidence – it *must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, and n. 7 (1981)" – cited in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510, n. 3 (1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



James A. Grace
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(954) 523-3334

Date: JAN 28 2002

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JAMES A . GRACE,

Plaintiff,

-against- MEMORANDUM AND ORDER
90-CV-1286 (DRH)

SECRETARY OF DEFENSE,

Defendant.
----------X
A P P E A R A N C E S:

For Plaintiff:
LeBoeuf, Lamb, Green &
MacRae, LLP
125 West 55th Street
New York, New York 10019
By: Patrick C. McGuinness, Esq.

For Defendant:
Loretta E. Lynch
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, New York 11201
By: Vincent Lipari, A.U.S.A.

HURLEY, District Judge

The above captioned case was tried before me non-jury. The purpose of this decision is to provide my findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52.

Plaintiff, James A. Grace ("plaintiff" or "Grace"), in an action brought pursuant to 42 U.S.C. sec 2000(e) et seq., ("Title VII"), contends that the Navy Resale and Service Support Office ("NAVRESSO" or defendant") unlawfully terminated his employment in retaliation for his opposition to gender discrimination in the workplace. Defendant states that plaintiff was discharged due to his deficiencies as a supervisor.

FINDINGS OF FACT

1. Stipulated Facts
   a. Grace was hired by NAVRESSO on May 3, 1988.
   b. Grace's duties included supervising Eliseo Flores, Ruth Pang, David Cato, and Thao Le.
   c. Grace's immediate supervisor was Richard Beauchemin ("Beauchemin").
   d. Beauchemin's immediate supervisor was James Devine ("Devine").
   e. By letter dated August 31, 1988, Grace nominated William Olarin ("Olarin") for a human relations award.
   f. On or about September 6, 1988, Beauchemin spoke with Grace about his nomination of Olarin for the human relations award.
   g. On November 8, 1988, Grace's employment with NAVRESSO was terminated. (Joint PreTrail Order at 4-5.)

2. Nature of Plaintiff's Employment Duties

Grace was hired by NAVRESSO for a "twelve (12) month probationary period" for a position at Naval Station on Staten Island, New York. (Pl.'s Trail Ex. 2.) Conflicting evidence was presented as to whether he was a Supervisory Auditor or an Electronic Data

Processing ("EDP") Audit Supervisor. But whatever the appropriate job title, it is clear that Grace's "duties included supervising Eliseo Flores, Ruth Pang, David Cato and Thao Le," those being the four individuals assigned to his auditing unit. (Joint Pretrial Order, Stipulated Facts and Law at A. 2 (referred to as 1(b) above); Dep. Of Beauchemin, dated Oct. 29, 1998 ("Beauchemin Dep.") at 16; Dep. Of Devine, dated Oct. 26, 1998 ("Devine Dep.") at 100-01.)

Grace was well-credentialed for his position with NAVRESSO. He received a B.S. degree, with a major in accounting, from the Wharton School of Finance and Commerce of the University of Pennsylvania in December 1977. (Tr. At 13.)[1] He also was a Certified Public Accountant licensed by the State of Pennsylvania and had taken computer programming courses at the Maxwell Institute and various graduate level courses at Temple University. (Id. At 13-14.) His level of expertise in electronic data processing was at least commensurate with his education for, as Devine explained, his understanding of the subject was "[m]uch beyond any of our other people." (Devine Dep. At 57.)

3. Plaintiff Performance as a Supervisor

Plaintiff's technical proficiency was, in the opinion of Beauchemin and Devine, more than counterbalanced by his poor performance in supervising the work of his subordinates. Beauchemin, his immediate supervisor, testified that he was the recipient of complaints from "people on [Grace's] team" that Grace "would yell at people and almost had a physical confrontation with one employee." (Beauchemin Dep. At 23.) "Both Ms. Pang and Mr. Cato had asked to be taken off Mr. Grace's team." (Id.

[1] References to "Tr." Refer to the trial transcript, dated November 5, 1999.

at 24.) Parenthetically, at one of the sessions when Devine and Beauchemin sought to counsel Grace about his supervisory shortcomings, Beauchemin reports that he "started yelling and screaming at us." (id. at 53.)

Complaints from subordinates were not limited simply to plaintiff" demeanor. By way of example, in an August 10, 1988 memorandum to Grace, Mr. Cato expressed "concern over the amount of audit related/field training I have received. I am open to any suggestions or tasks that would provide me with more audit training." (Def.'s Trial Ex. A)

The nature of plaintiff's relationship with the members of his auditing unit is further evidenced by reference to Ms. Pang who, incidentally, filed two EEO complaints against Grace. (Tr. At 92.) While it appears that Ms. Pang was less than a model employee, his efforts to supervise her left much to be desired. In that regard, consider Beauchemin's September 30, 1988 memorandum regarding Ms. Pang studying for the CPA examination during working hours, and Grace's efforts to correct that situation. (Beauchemin Dep. Ex. 5.) At Beauchemin's suggestion, Grace spoke to Pang "but failed to get the message across because the conversation ended up in a shouting match." Id.

Beauchemin and Devine discussed with Grace the need for him to improve his supervisory skills, both before and after the nomination of Olarin for a human relations award. (See, e.g., Def.'s Trial Ex. C; Beauchemin Dep. Ex. 3, dated Aug. 30, 1988 (after commending Grace for the "outstanding survey" he had done, he is reminded that, as a supervisor, he is required "to train and develop" his subordinates); Def.'s Trail Ex. D ("Memorandum for the Record" dated Sept. 23, 1988 detailing "COUNSELING SESSION[S]" involving Messrs. Grace, Beauchemin and Devine held on September 21, 1988 and September 22, 1988).)

In sum, it appears that plaintiff mastered the technical aspects of his job with defendant, but was woefully inadequate – or at least perceived to be so by defendant – in meeting the supervisory demands of the position.

4. Grace's Nomination of Olarin for a Human Relations Award

On August 31, 1988, Grace nominated co-employee Olarin for a human relations award. (Tr. at 21, 24.) The purpose of the award was to advance the principles of the Equal Employment Opportunity Program. (Id. at 21.) In nominating Olarin, Grace stated:

> In conjunction with the annual human relations award, I nominate Bill Olarin (AIRG2) for this award.
>
> The reason I feel Bill is deserving of this award is his reaction to sexual harassment in the workplace. It is my impression that this sexual harassment was of a blatant nature. Bill became aware of it and reported it. He has indicated, that due to him reporting this, there was an attempt to discredit him
>
> Since Bill is an auditor, he might be discounted for the award under the notion that he was only doing his job as an auditor in reporting sexual harassment. However, in my view, few auditors would report it. I think that it was important that Bill reported this problem and it's important that I support him in connection with it. There's a broader issue involved.
>
> In a recent Institute of Internal Auditors (IIA) regional conference, I heard one of the keynote

speakers talk about "Theory Z" and (the) importance of auditors getting involved in "soft systems"'. The individual's name is Harry Bernhard. His has a strong background in the human resources/industrial relations area. He has 30 years experience with IBM where he held management positions in Management Development, Executive Development, Line Personnel Management, and Personnel Research and Executive Resources. From 1985-1987, he was loaned to the faculty of the Harvard Business School as the Harvard/IBM Fellow. I was impressed with this individual (I don't impress easy) – not by his creditentials [sic] but by the content of this lecture. His message at the conference was entitled: "On beyond Z – a motivational complex for creating professional and organization excellence".

Harry spoke about Theory Z. It's a relatively new management theory and is based on the Japanese concept of managing companies. It embraces more of a family, loyal organization structure. Harry indicated that IBM has this philosophy. My impression is that Harry would be critical with many of today's contemporary managers who look only at the bottom line (for the current quarter or year). For some of these managers, this style might be describe [sic] as "go fast and look good".

In Theory Z, the business is more than just the bottom line. Theory Z is a longer term approach. The word he used was "going concern". He pointed out that at IBM, if they have a bad quarter or a bad year, people don't get overly excited and there is not the pressure for big layoffs as in other companies. IBM has recognized that it is there for the long term and

cares about it's [sic] employees (which in turn works for the betterment of the company). Harry suggested that companie[s] that have adopted this long term approach and care about their employees are more likely to survive over the long term. Under this theory, there is a mutual respect and concern between the company and employees.

Harry indicated that auditors should be involved in what he called "soft systems" (e.g., human resources areas) and not just the traditional "hard systems" (e.g., financial statements). He suggested that in an area of the organization where there is a lot of inappropriate industrial relations, activities contrary to EEO, discrimination, etc. – one would likely find operations not properly controlled as well. He stated that sometimes the soft numbers are a better guage [sic] of what's truely [sic] going on in the firm, that is, how the firm is doing.

Bill Olarin reported a matter which I'm sure is contrary to both the spirit and the letter of Equal Employment Opportunity Program. He also showed good audit acumen in reporting this matter. Bill's performance was very much in tune with the thrust of Harry Bernhard['s] message as delivered at the recent auditors conference. I feel that bill has enhanced the stature of the audit department by his performance in this matter and should be considered for the human resources award.

(Pl.'s Trail Ex. 4.)

Grace's nominating memorandum is devoid of the type of specific information one might expect, such as when and where the incident of sexual harassment

occurred. In fact, the incident happened at a Navy base in Port Eugene, California, not at the Staten Island location where Olarin and Grace were working. Moreover, the date of the incident – which Grace learned after his nomination of Olarin, (Tr. at 87), - was in 1983, i.e., five years before the subject nomination.

It is plaintiff's position that the nomination is what ultimately and unlawfully led to his discharge. He testified that his relationship with Beauchemin and Devine was generally good prior to the nomination and that thereafter they "attacked" him, gave him "mandates" which were not given to others in this position, and were "sharply critical" of this performance. (Id. at 47, 49-50.) Grace also testified that Beauchemin confronted him on two occasions shortly after the nomination was filed. On the first occasion, he was told to keep his nomination "quiet," (id. at 29), and on the second occasion when the subject was broached, he, Beauchemin, shook his head "disgustingly." (Id. at 30.)

Plaintiff's counsel, in their thorough and professionally crafted proposed findings of Fact and Conclusions of Law, argue that "defendant admits that the nomination played some role in his unhappiness with Grace." (Pl.'s Proposed Findings of fact and Conclusions of Law, P 37 at 14.) However, that "unhappiness" was not because of Grace's support of a co-worker's report of sexual harassment in the workplace per se, but because the nomination was carelessly presented in an unprofessional manner and, in the judgment of Beauchemin, violated organizational protocol which required the nomination to proceed through the chain of command, beginning with him. (Beauchemin Dep. At 40-41.) Which is to say, it was not the subject of the nomination which troubled management. Accordingly, I find that plaintiff's

discharge is not attributable, in whole or in part, to this engagement of a protected activity under Title VII.

5. Grace's Termination

On November 8, 1988, Grace's employment was terminated by NAVRESSO at a meeting attended by Grace, Beauchemin and Devine. The Notice of Termination, prepared that day, cited plaintiff's supervisory inadequacies as the basis for NAVRESSO's action. (Pl.'s Trial Ex. 7.)

CONCLUSIONS OF LAW

An employee's support of a co-worker's report of sexual harassment in the workplace is a protected activity under Title VII. See Thomas v. American Horse Shows Ass'n, No. 97-CV-3513, 1999 WL 287721, at **12-13 (E.D.N.Y. Apr. 23, 1999), aff'd, 205 F.3d 1324 (2d Cir. 2000). The question before me as the trier of fact is whether Grace has established by a preponderance of the evidence that a motivating factor in his discharge was his engaging in such conduct. Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993).

The analytical frame work established in McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) is, I believe, better utilized with respect to a motion for summary judgment under Rule 56 or for judgment as a matter of law under Rule 50 than for the resolution of the discrete factual issue with which I am presented. Nonetheless, the parties employed the McDonnel Douglas methodology in their post-trial submissions and, accordingly, so will I.

Under McDonnel Douglas, a court must undergo a three part analysis in evaluating a retaliatory discharge claim. First, the plaintiff has the burden of

proving a prima facie case of retaliation. Summer v. United States Postal Serv., 899 F2d 203, 208 (2d Cir. 1990); Rosa v. National Westminster Bank, 842 F. Supp. 679, 691 (E.D.N.Y.), aff'd, 41 F.3d 1501 (2d Cir. 1994). To do so, plaintiff must show (1) that he engaged in a protected activity under Title VII, (2) that his employer was aware of that activity, (3) that he suffered an adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996). The burden of establishing a prima facie case is not onerous. Henderson v. Center for Community Alternatives, 911 F. Supp. 689, 700 (S.D.N.Y 1996) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

Here, plaintiff has established that his nomination of Olarin was a protected activity and that at least Beauchemin, (Tr. at 38-39), if not Devine, (id. at 68-69), was aware of the nomination. He has also established that the employer took an adverse action against him via his discharge. However, plaintiff has failed to establish the fourth prong necessary to establish a prima facie case, to wit, a causal connection between the protected activity and the adverse action. Plaintiff is not aided by the temporal proximity between his nomination of Olarin on August 31, 1988 and his discharge on November 8, 1988 because that evidence is more than offset by the evidence which establishes that his discharge was caused by his inability to provide his subordinates with appropriate training and supervision. His nomination of Olarin played no part in his discharge except to the extent that the nomination reflected poor judgment – not as to subject matter – but rather as to its manner of presentation. In sum, I find that Grace has failed to establish a prima facie case vis-à-vis causation, notwithstanding the non-onerous nature of his burden of proof.

Since I have embarked on applying the McDonnell Douglas methodology to my role as trier of fact, however, I will address the next two parts of the analytical process. To do so, I will assume, arguendo, the plaintiff has made out a prima facie case.

Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to come forward with evidence that plaintiff was discharged based on a legitimate, non-discriminatory reason. Burdine, 450 U.S. at 254. The burden is one of production, not persuasion. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2106 (2000) (citing St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 509 (1993)). Defendant has come forward with a nondiscriminatory reason for discharging plaintiff, to wit, his deficiencies as a supervisor. Such being the case, "'the McDonnel Douglas framework – with its presumptions and burdens' disappeared, . . . and the sole remaining issue [is] 'discrimination vel non.'" Id. (citations omitted). And, as to that ultimate issue, the burden of proof, of course, rests solely with plaintiff.

As explained in Reeves, a plaintiff's prima facie case, coupled with a showing that defendant's proffered reason for his or her discharge is unworthy of belief, may well be sufficient to permit a finding of unlawful discrimination without any additional evidence being presented. However, that recent holding by the Supreme Court does not assist Grace. He has neither satisfied the fourth, or causation prong necessary to establish a prima facie case, or that the reasons advanced by defendant for his discharge are pretextual in nature.

In sum, plaintiff has not proven that a motivation factor in his discharge was his opposition to gender discrimination in the workplace.

CONCLUSION

For the reasons indicated, judgment is awarded to defendant and plaintiff's complaint is dismissed. The Clerk of the Court is directed to close this case.

The above constitutes the decision and judgment of the court.

SO ORDERED.

Dated: Hauppauge, New York
August 28, 2000

s/Denis R. Hurley

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICTA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of October two thousand one.

Present: HONORABLE JON O. NEWMAN,

HONORABLE AMALYA L. KEARSE,

Circuit Judges,

HONORABLE GREGORY W. CARMAN,

Chief Judge*.

---

* Honorable Gregory W. Carman, Chief Judge of the United States International Trade, sitting by designation.

JAMES A. GRACE,

Plaintiff-Appellant,

- v. - No. 00-6336

NAVY RESALE & SVR. SUPPORT OFFICE, RODNEY K. SQUIBB, F.W. KOWALSKI, JAMES DEVINE, RICHARD BEAUCHEMIN, SECRETARY OF THE DEPARTMENT OF DEFENSE,

Defendants-Appellees.

Appearing for Appellant: James A. Grace pro se, Ft. Lauderdale, Fla.

Appearing for Appellees: Vincent Lipari, Ass't U.S. Att'y, EDNY, Central Islip, N.Y.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the record from the United States District Court for the Eastern District of New York, and was argued by plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiff pro se James A. Grace, who was represented by counsel at trial, appeals from a judgment of the United States District Court for the Eastern District of New York, Denis R. Hurley, Judge, dismissing his complaint alleging that defendants

violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec 2000e et seq., by termination his employment because of his opposition to gender discrimination. The district court, following a bench trial, found that Grace had failed to establish by a preponderance of the evidence that his opposition to gender discrimination, as reflected by his nomination of a coworker for complaining of such discrimination, was a motivation factor in his discharge. On appeal, Grace contends principally that the court failed to address his contention that defendants' proffered reasons for the termination of this employment were pretextual, and that the court's findings of fact and conclusions of law were unsupported. We find no ground for reversal, and we affirm substantially for the reasons stated in Judge Hurley's Memorandum and Order dated August 28, 2000.

We see no error of law in the principles applied by the district court. Although the sequential steps laid out by Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), need not have been followed after a trial, see, e.g., Coffey v. Dobbs International Services, Inc., 170 F.3d 323, 326 (2d Cir. 1999), the court noted the principle that was dispositive in this case, to wit, that Grace had the burden of proving by a preponderance of the evidence that he was fired in retaliation for engaging in protected activity, see, e.g., St Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. at 256; Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993). The district court found that Grace had failed to show that his opposition to gender discrimination was a motivating factor in his discharge. There is evidence in the record to support that finding, and we cannot conclude that it is clearly erroneous.

Nor is there merit in Grace's contention that the judgment should be vacated because the court failed to address expressly his contention that his performance was not evaluated in accordance with the established performance appraisal system and that defendants' assertion that he was fired for poor performance was thus pretextual. A proffered "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Center v. Hicks, 509 U.S. at 515 (emphases in original). The lack of a proper performance evaluation was one factor that the district court was entitled to consider in determining whether defendants had acted out of improper motivation, but it did not require the court to reach a conclusion that such improper motivation had occurred. Given the trial court's permissible finding that prohibited discrimination or retaliation was not a motivating factor, the explanations proffered by defendants could not be pretext "for" discrimination or retaliation.

We have considered all of Grace's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk
by:

s/Lucille Carr